Nos. 24-966, 24-971

IN THE

Supreme Court of the United States

RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE, A D.C. NONPROFIT CORPORATION,

Petitioner,

v.

DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

SEAFREEZE SHORESIDE, INC., *et al.*,

Petitioners,

v.

DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* SAVE RIGHT WHALES COALITION IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Save Right Whales Coalition (the Coalition) respectfully submits this brief in support of Petitioner's request for a writ of certiorari. This case raises a fundamental question about agency power—whether the Bureau of Ocean Energy Management (BOEM) may unilaterally reinterpret the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 et seq., to expand its discretionary authority beyond what Congress provided.

The Coalition is an alliance of environmental and community organizations, scientists, fishermen, and conservationists dedicated to protecting both the critically endangered North Atlantic right whale and the livelihoods of those who depend on a healthy ocean. It advocates for responsible ocean stewardship and works to ensure that marine ecosystems and coastal economies are not compromised by unchecked industrialization.

The Coalition represents stakeholders affected by BOEM's regulatory overreach—including fishermen, maritime industries, and offshore resource users. These communities rely on a clear and predictable regulatory framework that ensures fair and lawful treatment under OCSLA. By prioritizing offshore wind development

1. In accordance with Rule 37.2, both Petitioners' and Respondent's counsel were provided timely notice of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel other than *amicus curiae* made a monetary contribution intended to fund preparation or submission of this brief.

over the full range of statutory protections—such as environmental protection, navigational safety, and the prevention of interference with existing ocean uses—BOEM has disregarded Congress's mandates and undermined the rights of those who depend on a healthy ocean. This unchecked agency discretion puts both the fishing industry and fragile marine ecosystems at risk, necessitating this Court's intervention to restore statutory integrity and regulatory accountability.

SUMMARY OF THE ARGUMENT

This case presents two distinct and consequential questions of statutory interpretation under the Outer Continental Shelf Lands Act (OCSLA). In both instances, the Bureau of Ocean Energy Management (BOEM) acted beyond its delegated authority, replacing clear congressional mandates with discretionary balancing and administrative expediency.

First, BOEM unlawfully reinterpreted § 8(p)(4) to treat binding statutory protections as flexible policy considerations. This marked a departure not only in approach but in text: BOEM adopted a reading of the statute that altered the structure and meaning of its terms to expand agency discretion. The lower Courts upheld this expansive interpretation by deferring to the agency's view, despite this Court's command that courts must exercise independent judgment in interpreting statutes. That deference, and the significant implications of BOEM's reading, raise serious concerns under the major questions doctrine.

Second, BOEM violated § 8(p)(6) and its own regulations by allowing a 15-year deferral of decommissioning financial assurances for a major offshore wind project. The statute requires such safeguards as a condition of development—yet BOEM invoked a general procedural rule to bypass a specific, mandatory protection. This action contradicts the statute's structure and purpose and further demonstrates the agency's assertion of authority where Congress has set clear limits.

These actions reflect a broader pattern of administrative overreach. This Court's review is necessary to reaffirm Congress's role in setting policy, to enforce the limits of agency discretion, and to restore statutory protections that BOEM has unlawfully rewritten.

ARGUMENT

I. BOEM's Reinterpretation of § 8(p)(4) Violates the Statute and APA

A. M-37059 And M-37067: BOEM's Unlawful Policy Shift

At the heart of this dispute is BOEM's abrupt shift in interpreting OCSLA § 8(p)(4), which expanded the agency's discretion beyond statutory limits and prioritized offshore wind development at the expense of other lawful ocean uses.

In December 2020, the Interior Department's Solicitor's Office issued Solicitor Opinion M-37059, which reaffirmed that BOEM must independently satisfy each of the twelve statutory criteria set forth in § 8(p)(4).

M-37059 interpreted the statute's command to "ensure" compliance with each factor as a binding obligation, not a matter of agency preference. With respect to § 8(p)(4)(I), it concluded that "prevention" requires avoiding interference with reasonable ocean uses, such as fishing and navigation, and expressly rejected financial compensation as a lawful substitute. *See* DOI, Mem. from Solicitor to Secretary (M-37059) (Dec. 14, 2020), *available at* bit.ly/42p8INv.

In April 2021, the incoming administration revoked that guidance and issued Solicitor's Opinion M-37067, which reinterpreted OCSLA § 8(p)(4) to give BOEM discretion to balance the statutory criteria against each other rather than ensuring compliance with each independently. M-37067 also reinterpreted § 8(p)(4)(I), asserting for the first time that the phrase "as determined by the Secretary" modifies both the definition of "reasonable uses" and the standard of "prevention," effectively granting BOEM broader latitude to approve projects that adversely impact existing ocean users. *See* DOI, Mem. from Solicitor to Secretary (M-37067) (April 9, 2021), *available at* bit.ly/4jnaiXc.

Despite the significance of this policy shift, BOEM did not initiate a formal rulemaking process at the time. Instead, it immediately applied the M-37067 framework to approve major offshore wind projects, including Vineyard Wind 1, even though those projects had been planned under the legal framework established by M-37059. *See* BOEM Record of Decision (May 10, 2021), *available at* bit.ly/4i62LL6, at 8. It was three years later, in 2024, before BOEM began a formal rulemaking to codify the balancing

approach and textual reinterpretations introduced in M-37067.[2]

BOEM's implementation of M-37067 without engaging in notice-and-comment rulemaking further underscores its disregard for statutory limits. The Administrative Procedure Act (APA), 5 U.S.C. § 553, requires agencies to follow formal rulemaking procedures when adopting new interpretations that substantively alter the regulatory standard or affect the rights of regulated parties. See *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101–02 (2015) (The APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."). BOEM's reinterpretation of § 8(p)(4)—both in allowing balancing of mandatory criteria and in revising the meaning of the parenthetical in § 8(p)(4)(I)—effectively rewrote the statute without congressional authorization or public input. BOEM also did not invoke any emergency or "good cause" exception under § 553(b)(B), nor would such an exception

2. BOEM codified this discretionary balancing approach described in M-37067 on July 15, 2024. *See* 30 C.F.R. § 585.102 (stating that BOEM "will ensure that any activities authorized in this part are carried out in a manner that provides for and reaches a rational balance among the following goals to the extent they conflict or are otherwise in tension, none of which inherently outweighs or supplants any other"). This rule confirms BOEM's shift from enforcing statutory safeguards as independent mandates to treating them as trade-offs. Further, in codifying M-37067's interpretation, BOEM relocated the phrase "as determined by the Secretary" to the end of § 8(p)(4)(I), expanding its discretion to redefine reasonable ocean uses and interference. BOEM's delayed rulemaking, its 2024 adoption of M-37067's balancing approach, and its revision of § 8(p)(4)(I)'s text all confirm that the agency has exceeded the authority Congress provided.

have applied. The shift in legal interpretation was a matter of policy, not a response to imminent harm. Courts have consistently construed such exceptions narrowly and rejected their use as a shortcut for administrative expedience.

The current administration has since suspended M-37067 and placed it under review, implicitly conceding that the memorandum was legally flawed. *See* DOI Mem. from Solicitor to Assistant Secretaries (M-Opinion Review) (Feb. 28, 2025), *available at* bit.ly/41ZZh8i. However, BOEM has yet to revisit or rescind the project approvals granted under its framework, leaving affected ocean users and industries in a state of legal uncertainty.

B. Congress Did Not Authorize BOEM to Offset the OCSLA § 8(p)(4) Factors Against Each Other

OCSLA § 8(p)(4) directs that the Secretary "shall ensure" compliance with twelve distinct statutory criteria, including safety, environmental protection, national security, and the prevention of interference with reasonable ocean uses. Unlike § 18—which explicitly instructs the Secretary to balance economic and environmental interests—§ 8(p)(4) contains no such language.

While the Coalition acknowledges that BOEM has discretion in how it satisfies each statutory requirement—for example, by selecting mitigation strategies for environmental protection or identifying appropriate methods to prevent interference with navigation—it does not have the discretion to offset one mandate against another.

The lower courts acknowledged that the criteria in § 8(p)(4) are mandatory, but nevertheless held that BOEM may balance energy development with these mandates. *Seafreeze Shoreside, Inc. v. United States Dep't of the Interior*, 123 F.4th 1, 25-26 (1st Cir. 2024) ("BOEM must have 'discretion' in considering whether each statutory criterion is satisfied, and . . . must 'balance' the statutory mandate to develop energy projects"). This interpretation misreads the statute, contradicts congressional intent, and conflicts with *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007), which held that when a statute requires an agency to "ensure" compliance with multiple factors, the agency may not ignore or offset one requirement to advance another.

The courts further erred by mischaracterizing the plaintiffs' position as absolutist. *Seafreeze Shoreside, Inc. v. U.S. Dep't of the Interior*, No. 1:22-cv-11091-IT, 2023 WL 6691015 at *22 (D. Mass. Oct. 12, 2023) ("Plaintiffs advocate that each enumerated criterion must be satisfied to its absolute maximum"). Plaintiffs did not argue that BOEM lacks discretion over implementation; rather, they contended that BOEM may not trade off one statutory mandate against another. This mischaracterization sidestepped the real issue: whether BOEM may lawfully reinterpret § 8(p)(4) to subordinate one statutory requirement to another without congressional authorization.

By permitting BOEM to balance mandatory factors, the lower courts effectively rewrote OCSLA—granting the agency unchecked authority to elevate offshore wind development above all other ocean uses. That is not what Congress intended.

C. The Lower Courts' Deference to BOEM's Interpretation Is Improper in Light of Loper Bright

The lower courts further erred by deferring to BOEM's interpretation of OCSLA § 8(p)(4) without conducting an independent legal analysis. Rather than interpreting the statutory text themselves, the courts upheld BOEM's decision based on the agency's claim that it had discretion to balance offshore wind development with the statutory criteria.

That approach is no longer legally tenable. In *Loper Bright Enterprises v. Raimondo*, 601 U.S. 369 (2024), this Court overruled *Chevron* and reaffirmed that courts must exercise independent judgment when interpreting statutes. Deference to an agency's interpretation is not appropriate where the statutory language is clear or where the agency's reading exceeds the limits of its authority.

Had the lower courts applied *Loper Bright*, they would have been required to determine whether Congress authorized BOEM to balance the factors listed in § 8(p)(4). A proper reading of the statute confirms that no such authority exists.

Even if the lower courts ruled before *Loper Bright* was decided, this Court's review remains necessary to correct the error. Deference to BOEM's interpretation enabled the agency to offset one statutory requirement against another, unlawfully expanding its discretion beyond what Congress intended.

D. The Courts Failed to Consider BOEM's Shifting Legal Interpretations

The lower courts compounded their error by ignoring BOEM's shifting interpretation of OCSLA § 8(p)(4). Although plaintiffs raised the issue of BOEM's departure from its prior legal position, the courts failed to examine how the agency abandoned its earlier interpretation without justification.

M-37059 reaffirmed that BOEM must satisfy each of the twelve statutory criteria under OCSLA § 8(p)(4) independently. It interpreted "shall ensure" as a binding mandate rather than a flexible policy directive and rejected any reading that would allow BOEM to balance or offset one requirement against another. On interference, M-37059 clarified that "prevention" requires avoiding impacts, not merely mitigating them, and explicitly rejected financial compensation as a substitute, noting such schemes presume interference. By contrast, M-37067 adopted a balancing approach, allowing interference to be justified through mitigation or payment—without engaging with the legal reasoning in M-37059 or undergoing notice-and-comment rulemaking.

BOEM's reversal fails the "reasoned explanation" standard required for agency policy changes. In *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016), this Court held that an agency must provide a reasoned explanation when departing from a longstanding interpretation, especially when the new policy contradicts prior factual or legal findings. Here, BOEM had explicitly rejected balancing statutory mandates in M-37059. M-37067 reversed that position without engaging

with the prior legal reasoning, without acknowledging reliance interests, and without offering a substantive justification for treating the "shall ensure" directive as discretionary. Most notably, M-37067 is completely silent on compensatory mitigation—an issue M-37059 addressed directly and unequivocally.

The failure to reconcile these positions or explain the agency's departure renders BOEM's shift arbitrary and capricious under *Encino*.

E. The Courts Improperly Deferred to BOEM's Self-Justifications Instead of Conducting an Independent Legal Analysis

The courts further erred by relying on BOEM's own justifications and memoranda as evidence that the agency satisfied § 8(p)(4), rather than conducting an independent statutory analysis. In upholding BOEM's decision, the court stated that plaintiffs "ignore[d] the joint ROD and a May 10, 2021, information memorandum in which James F. Bennett, the Program Manager for BOEM's Office of Renewable Energy Programs, explains the conditions that BOEM imposed on the project and why approval of the project, with those conditions, satisfies the OCSLA § 1337(p)(4) criteria." *Seafreeze Shoreside, Inc.*, 124 F.4th at 26.

But an agency's own determination that it has complied with a statute is not dispositive. It is the court's responsibility to evaluate, independently and objectively, whether the agency has in fact followed the law. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, the district court treated

BOEM's justifications as conclusive proof of compliance, rather than critically assessing whether the agency had actually ensured compliance with each statutory mandate.

The court further mischaracterized plaintiffs' position by suggesting they believed BOEM must reject any project that impacts one or more of the § 8(p)(4) criteria. *Id.* at 49. That is incorrect. Plaintiffs do not argue that any project with impacts must be rejected. Rather, they contend—correctly—that BOEM must satisfy each statutory mandate independently and may not balance or offset one requirement against another.

Because the district court deferred to BOEM's self-justifications and failed to conduct a proper statutory analysis, and because it misrepresented the plaintiffs' claims, its ruling should be reversed.

F. BOEM's Substitution of Mitigation for Prevention Went Unchallenged by the Court

BOEM's public justifications and May 10, 2021 information memorandum reflect a fundamental misreading of OCSLA § 8(p)(4)(I), which requires the Secretary to "prevent interference with reasonable uses" of the Outer Continental Shelf.[3] Rather than ensuring offshore development avoids interfering with ocean uses such as commercial fishing, BOEM approved Vineyard

3. BOEM's May 10, 2021 memorandum relies on M-37067 in justifying its balancing framework in approving Vineyard Wind 1, stating "M-37067 guides the Bureau of Ocean Energy Management's (BOEM) compliance review of the Construction and Operations Plan (COP) for the Vineyard Wind 1 Project on Commercial Lease OCS-A 0501, and BOEM's consideration of the 12 factors enumerated in subsection 8(p)(4) of OCSLA".

Wind 1 based on compensatory funds and mitigation measures. The agency asserts in its May 10 memo that "including all the measures above would mitigate impacts the Project is expected to have on commercial fisheries and for-hire fisherman and will prevent unreasonable interference with said fishing interests." *See* DOI, Mem. from Bennett to Lefton (May 10, 2021), *available at* bit.ly/3FU1lWX, at 25. In other words, BOEM equated mitigation with prevention, interpreting the statute to allow harm-reduction strategies as a substitute for actual avoidance of interference.

The First Circuit echoed this framing in its recitation of the administrative record, stating that BOEM "acknowledged that the project would likely have a negative economic impact on commercial fishing. But it suggested that potential revenue losses could be offset by compensatory funds that Vineyard Wind had agreed to set aside. It also proposed mitigation measures that would reduce negative impacts." *Seafreeze Shoreside, Inc.*, 123 F.4th at 13. Yet the court failed to examine whether those measures actually satisfy the statute's requirement to prevent interference. Instead, it accepted BOEM's rationale without conducting an independent legal analysis—effectively allowing the agency to define for itself what compliance means. As M-37059 correctly recognized, "the creation of [a compensation] system presumes interference." Mem. M-37059, *supra* at 12. BOEM's reversal of that position—and the court's failure to scrutinize it—undermines the plain text of § 8(p)(4) and opens the door to unchecked agency discretion.

Because BOEM's balancing approach and reliance on mitigation violate OCSLA's clear statutory language, its

decision cannot stand. This Court should reverse the lower court's ruling and affirm that BOEM must comply with each statutory requirement as written—not treat them as competing interests to be weighed against one another.

II. BOEM's Deferral of Decommissioning Financial Assurances for Vineyard Wind 1 Violates OCSLA and the APA

OCSLA § 8(p)(6) requires BOEM to "ensure" that lessees furnish financial assurance sufficient to cover decommissioning obligations. Its implementing regulation, 30 C.F.R. § 585.516, mandates that this security be posted before installation of facilities under a Construction and Operations Plan (COP). These safeguards are critical to prevent stranded infrastructure and protect taxpayers from bearing decommissioning costs if a project defaults.

Yet BOEM approved a 15-year deferral of Vineyard Wind 1's decommissioning financial assurance obligations, contrary to both statute and regulation. Vineyard Wind, a limited liability company owned by two multinational energy firms, received this deferral not due to hardship or emergency, but to facilitate financing. BOEM invoked its general departure authority under 30 C.F.R. § 585.103(b)—despite the clear, specific requirement in § 585.516. *See* Vineyard Wind 1 Financial Assurance Departure Letter for Lease OCS-A 0501 (June 15, 2021), *available at* bit.ly/420v2hx, at 2.

Neither OCSLA nor BOEM's regulations authorize such a delay. The statute makes financial assurance a mandatory condition of the lease—not an optional or discretionary term. Nothing in § 8(p)(6) permits BOEM to

waive or postpone this obligation for more than a decade. BOEM's general departure authority under 30 C.F.R. § 585.103(b) cannot be used to circumvent the specific requirement in § 585.516 that financial assurance be posted before installation. As this Court has explained, general grants of discretion do not override specific mandates. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

Moreover, Vineyard Wind's structure as an LLC increases the risk that its parent entities could avoid liability in the event of default, transferring financial exposure to taxpayers. BOEM's long-term deferral of this core financial safeguard directly contradicts the statutory purpose of § 8(p)(6), which was intended to ensure that decommissioning liabilities are secured up front.

This episode exemplifies the unchecked discretion BOEM has asserted under OCSLA. The agency bypassed mandatory protections and invented flexibility that Congress did not authorize—mirroring the same pattern of statutory overreach seen in its broader reinterpretation of § 8(p)(4). This Court's intervention is warranted to prevent agencies from rewriting specific legislative commands under the guise of implementation.

III. CONCLUSION

BOEM's unauthorized interpretations of OCSLA—first by balancing mandatory criteria under § 8(p)(4), and then by postponing decommissioning assurance under § 8(p)(6)—replace clear statutory protections with discretionary trade-offs, undermining both regulatory integrity and lawful use of ocean resources. The agency has unlawfully transformed independent statutory mandates into policy-driven decisions, substituting mitigation and financial delay for legal compliance. Compounding this error, the lower courts improperly deferred to BOEM's self-justifications rather than conducting an independent statutory analysis, allowing the agency to approve projects based on its own unchecked discretion rather than congressional mandates.

If left uncorrected, this ruling would set a dangerous precedent, granting agencies sweeping power to rewrite statutes through internal memoranda—without public input, formal rulemaking, or legislative authority. Such an assertion of regulatory power, untethered from clear congressional authorization, directly implicates the concerns addressed in *West Virginia v. EPA*, 597 U.S. 697 (2022), where the Court reaffirmed that agencies may not resolve questions of major economic and political significance absent a clear mandate from Congress.

This Court's review is essential to reaffirm the limits Congress placed on agency power, to restore the integrity of statutory protections, and to ensure that lawful ocean

users are not displaced by discretionary policymaking that exceeds the bounds of law.

Respectfully submitted,

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